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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. .....

UNCLE BEN'S, INC.,
Petitioner,

v.

THOMAS JOHNSON, Individually and on Behalf of All Others Similarly Situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NEIL MARTIN
PHILIP J. PFEIFFER
ROBERT S. BAMBACE
Counsel for Petitioner, Uncle Ben's, Inc.

Of Counsel:
FULBRIGHT & JAWORSKI
Landmark Building, Suite 200
705 E. Houston
San Antonio, Texas 78205
Telephone: (512) 224-5575

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court below erred in holding that the District Court adopted and applied an erroneous notion of controlling legal principles regarding the use and role of statistics in an employment discrimination case?

2. Whether the Court below erred in approving the unqualified use of static workforce data to establish a *prima facie* case of promotion discrimination?

3. Whether the Court below erred in holding that comparisons of a defendant's workforce to the external labor market are irrelevant in determining whether the defendant discriminates against blacks with respect to promotions?

4. If a *prima facie* case of discrimination in promotions is established, does *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973) require a defendant to prove the existence of legitimate, nondiscriminatory reasons by a preponderance of the evidence?

5. Whether the disparate impact theory is applicable to claims of classwide discrimination which merely claim defendant bases promotions on race and do not identify any objective, facially neutral employment practice alleged to disproportionately affect blacks?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Uncle Ben's, Inc. respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Johnson* v. *Uncle Ben's, Inc.*, 628 F.2d 419, entered on October 17, 1980.

OPINIONS BELOW

The opinion of the District Court is reported at 71 F.R.D. 19 (S.D. Tex. 1978), and is reprinted in the separate Appendix hereto as App. C. The first opinion of the Court of Appeals is reported at 615 F.2d 915 (5th Cir. 1980), and is reprinted as App. B. The opinion of the Court of Appeals on rehearing — the

decision from which certiorari is sought — is reported at 628 F.2d 419 (5th Cir. 1980), and is reprinted as App. A.

JURISDICTION

The judgment sought to be reviewed was dated and entered on October 17, 1980. Uncle Ben's Petition for Rehearing and Suggestion of Rehearing En Banc (App. D) was denied by Order dated November 24, 1980 (App. E). The jurisdiction of this Court is invoked under 28 USC §1254(1) (1976).

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964 (hereinafter "Title VII"), 42 U.S.C. §2000e, *et seq.*, page 277, and 42 U.S.C. §1981, page 210. Relevant portions of these Statutes are reprinted in App. F.

STATEMENT OF THE CASE

A. PROCEDURAL OVERVIEW

Thomas Johnson (hereinafter "Plaintiff") brought this class action on March 28, 1974, alleging Uncle Ben's, Inc. (hereinafter "Uncle Ben's" or "Defendant") discriminated against him and similarly situated blacks and Mexican-Americans in violation of 42 U.S.C. §1981. The complaint was amended September 12, 1975 to add Title VII of the Civil Rights Act of 1964. Plaintiff's allegations were limited to the period commencing March 28, 1972 and charged discrimination "with respect to compensation, hiring, promotion, transfer, seniority and other terms and conditions of employment."[1]

[1] The Pretrial Order stated the issue in terms of determining discrimination from and after March 28, 1972. This time frame limitation under §1981 is consistent with *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1378 (5th Cir. 1974). Under Title VII, a violation could only be based on discriminatory acts occurring within 180 days of the filing of Plaintiff's EEOC charge on February 19, 1974, i.e., August 19, 1973. *United Airlines* v. *Evans*, 431 U.S. 553 (1977).

The case was tried October 3-21, 1977, with Plaintiff representing a class of blacks and Mexican-Americans.

At the end of Plaintiff's direct case, Defendant's motion for dismissal was granted as to all issues except discrimination in promotions of blacks.[2] In rebuttal of Plaintiff's *prima facie* case, Defendant called its personnel manager and three experts. At the conclusion of Plaintiff's direct examination of his expert rebuttal witness, the District Court ruled for the Defendant from the bench. The District Court entered detailed Findings of Fact and Conclusions of Law on January 11, 1978. Plaintiff filed his Notice of Appeal on February 9, 1978.

The Fifth Circuit affirmed *per curiam* on April 11, 1980. On April 24, 1980, Plaintiff filed a Petition for Rehearing, contending the panel erred in affirming the District Court's Findings under the clearly erroneous standard. Plaintiff argued that the District Court's statement regarding statistics (App. C-2) was erroneous as a matter of law because it reflected the District Court's belief that statistics are irrelevant in judging claims of employment discrimination. The Fifth Circuit did not request a response from Defendant. On October 17, 1980, the panel granted the petition for rehearing, ruling that the District Court adopted and applied an erroneous notion of controlling legal principles on the role of statistics. The panel modified and affirmed in part, reversed in part, and remanded.

B. THE PROCEEDINGS BEFORE THE DISTRICT COURT

Plaintiff's statistical proof in his direct case was limited to testimony adduced from Dr. Richard Tapia, a statistician. Dr. Tapia's sole concern and his subsequent analyses concentrated on the existence of a pattern of disparity with respect to what he perceived as the "upward mobility," i.e., monetary advances

[2] As phrased by Plaintiff's expert, the issue was actually one of "upward mobility," which was defined by Plaintiff's expert as the monetary advancement of incumbent employees over time.

over time, of black employees.[3] Tapia based his conclusions on Table III of Plaintiff's Exhibit 8, primarily Table III.3, his only analysis restricted to the relevant time frame as defined in the pre-trial order. Table III.3 purported to assess the 1971-1974 "upward mobility" of blacks and whites *employed both dates* and encompassed only comparisons of *average wage increases*. Dr. Tapia relied on Table III.3 to conclude that blacks in lower income groups had not progressed forward as rapidly as whites.

Cross-examination of Dr. Tapia and the testimony of Defendant's witness, Dr. Roy Gilbert, an expert in econometrics and computer systems, disclosed that Table III.3 was inaccurate in virtually every respect. When Dr. Tapia's statistics were corrected by Dr. Gilbert, they failed to establish a discriminatory pattern favoring whites. Rather, the statistics established a pattern of upward mobility which did not favor whites, and, overall, *did favor blacks* with significantly greater wage increases.[4]

Defendant's expert proof was introduced through Dr. Richard Jeanneret, an industrial psychologist and management consultant, Dr. Gilbert, and Dr. Gordon Otto, an expert in econometrics.

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[3] Although Plaintiff's allegations included the entire spectrum of Defendant's employment practices and policies, Plaintiff's expert testimony and statistical analyses were limited to upward mobility as a function of salary increases. The only reference made by Dr. Tapia to any other employment policy/practice was to hiring, as to which he commented favorably. Specifically, in his effort to explain how the fact that from 1971 to 1974 the wages of black employees advanced more rapidly than the wages of whites, he cited the increased hiring of blacks into higher paying positions.

[4] Whereas Dr. Tapia claimed that the "all" employee category included 174 white and 102 black employees (P., Ex. 8, Table III.3), there were actually 191 white and 127 black employees (D. Ex. 31). Instead of the 20% white and 22% black average employee wage increases shown on Table III.3, white employees actually received only 17.97% on the average while blacks received 23.01% (D. Ex. 31). Contrary to Dr. Tapia's testimony, the percentage difference *favoring blacks* was statistically significant at the 5% level. In fact,

Dr. Otto examined all promotions that occurred at Uncle Ben's from 1970-1974. Based on this examination, Dr. Otto concluded that no statistically significant differences existed in the advancement of blacks and whites (a) in the number of promotions, (b) time in grade prior to promotion, and (c) wage increases received upon promotion.

Dr. Jeanneret analyzed Defendant's job descriptions in accordance with EEOC and professional guidelines and accurately placed Uncle Ben's jobs in 1970 census occupational categories. He established that a great many jobs at Uncle Ben's

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the difference was highly significant, amounting to 5 standard deviations. Comparable errors in Dr. Tapia's analyses exist with respect to the employee group of "all except managers and officials" (D. Ex. 31); although the difference is no longer statistically significant, the average wage increase received by black employees during the subject time period exceeded by 1.26% that received by whites (D. Ex. 31). These analyses were limited to employees employed throughout the relevant time frame.

In terms of the wage level groupings utilized by Dr. Tapia, e.g., "at or below a given wage rate," Defendant's evidence established that the conclusion reached by Dr. Tapia in each instance was erroneous (D. Ex. 51, 60). In the lowest wage level, less than or equal to $8,500, Dr. Tapia found that whites received an average 53% wage increase while blacks received only 30% (P. Ex. 8, Table III.3). Identifying the subject employees by name and listing their wage rates as of 8-8-71 and 5-10-74, Dr. Gilbert established (1) that the average percentage increase for whites was 35.9% and for blacks was 30.5%, and (2) that this difference was not statistically significant at the 5% level (D. Ex. 57). With respect to the group of employees earning less than or equal to $9,000 (P. Ex. 8, Table III.3), Dr. Tapia claimed that the white (43%) vs. black (29%) wage differential was statistically significant at the 1% level. Again identifying the subject employees by name and giving their wage rates as of 8-8-71 and 5-10-74, Dr. Gilbert established that the actual difference was 3.3% (32.5% for whites and 29.2% for blacks) and that this difference also was not statistically significant (D. Ex. 57). In addition, Dr. Gilbert demonstrated the bias resulting from Dr. Tapia's use of dependent groupings. If rather than focusing on *all* employees earning less than or equal to $10,000, the analysis was limited to those earning less than or equal to $10,000 *and* more than or equal to $9,000, black wage increases actually exceeded those received by white employees (D. Ex. 60).

require knowledge or skills not obtainable through on-the-job or internal training or experience.[5]

Because many jobs require knowledge or skills not obtainable at Uncle Ben's, Gilbert, using the job to census category correlations and the 1970 census, computed the proportionate availability of whites and blacks for the jobs at Uncle Ben's. He then compared the actual number of employees in Uncle Ben's job zones with this expected number and concluded that the employment pattern at Uncle Ben's was consistent with external availability.

Defendant's Personnel Director, Herman Koehn, presented evidence of the upward mobility of individual black employees whom Plaintiff claimed had been relegated to lower level jobs.[6] He testified that any differences in black-white upward mobility

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[5] Dr. Jeanneret listed numerous positions both in the plant and office that require certain knowledge, ability and/or skills that cannot be obtained merely by working at Uncle Ben's. For example, he observed that welders need welding experience; sheetmetal workers need sheetmetal skills; food technologists need knowledge of chemistry and biology plus an understanding of research principles; typists must be able to type; maintenance first class employees need electrical and mechanical skills; cost, control, budget, and financial analysts need accounting skills; microbiology analysts need training in microbiology or a related specialty; keypunch operators need keypunch training; computer operators need training in operating computers; production schedulers need mathematical skills and ability to forecast production schedules.

[6] The black employees identified by Defendant were in response to Plaintiff's statistical analyses, which focused on blacks on the payroll as of May 1974 who were hired prior to 1965 or 1960. Also, Table V of Plaintiff's Exhibit 8 identified specific employees whom Dr. Tapia claimed were illustrative of Plaintiff's theory that blacks in lower job zones did not advance, in terms of wage increases, as fast as whites. In light of Plaintiff's assertions, the importance of evidence demonstrating why certain identified individuals within lower level jobs did not advance to upper-level positions cannot be gainsaid. Accordingly, Defendant presented, through its Director of Personnel, evidence regarding the upward mobility of blacks identified or referenced through Plaintiff's analyses.

were due not to race, but to specified individual attributes of the employees in question, e.g., lack of interest in changing jobs; failure to obtain outside training and requisite skills; limited ability to read, write and make numerical calculations; promotion refusals; non-shift work requests; and performance shortcomings. Plaintiff offered no evidence that the explanations given by Mr. Koehn were pretextual.

C. THE DISTRICT COURT'S OPINION

The District Court, having heard approximately three weeks of testimony and having reviewed a multitude of documentary evidence, entered detailed Findings of Fact examining the extensive statistical analyses conducted by both Plaintiff's and Defendant's expert witnesses (App. C).

The Court rejected the conclusion drawn by Plaintiff's expert from his "upward mobility" analysis of average wage increases that blacks in lower income groups had not progressed forward as rapidly as whites. Specifically, the Court found:

> 12. During the period from August 8, 1971 through May 10, 1974, limiting the analysis to employees who were employed on both dates, Defendant's black employees received a statistically significant greater wage increase than did Defendant's white employees. See Defendant's Exhibit No. 31. Further, contrary to Table III.3 of Plaintiff's Exhibit No. 8, the Court finds that the percentage increase in black wages exceeded the percentage increase in white wages regardless of whether or not individuals in job classifications falling within EEOC category "Officials & Managers" are included. See Defendant's Exhibit No. 31. Utilizing salary level grouping suggested by Plaintiff's Exhibit No. 8, e.g., employees earning less than a given amount, any differences in black-white wage increases during the 1971-74 period were not statistically significant. See Defendant's Exhibit No. 57 (App. C-4, C-5).

With respect to Dr. Otto's analysis of all promotions which occurred at Uncle Ben's during 1970-1974, the District Court found that in terms of (a) the number of employees promoted,

(b) their time in grade prior to promotion, and (c) the wage increases received upon being promoted, "there has been no statistically significant difference in the treatment of Defendant's black and white employees." Findings of Fact No. 19 (App. C-6).

The District Court additionally found that any claimed differences in upward mobility as between black and white employees were due to specific, individual attributes of Defendant's employees, not to the race of the employee concerned. According to the court, these attributes included, "for example, limited ability to read, write and make numerical calculations; promotion refusals; demotion requests; non-shift work requests; lack of interest in changing jobs; and performance shortcomings." Findings of Fact No. 13 (App. C-5).

On the basis of these factual findings, the Court concluded that Uncle Ben's did not discriminate against Plaintiff and the class he represented on the basis of race with regard to promotions. Conclusions of Law No. 4 (App. C-6, C-7).

The District Court incorporated into his detailed findings the following remarks made from the bench at the conclusion of Plaintiff's direct examination of his expert rebuttal witness:

> *First*, on statistics. *If* we accept the Plaintiff's side of the case, all that the experts say, the way I see it, is that what has transpired in the real world at Uncle Ben's could not have statistically happened by chance.[7] We are not here to enforce a law which says that things must occur within the limits of mathematical probability. The law says the defendant may not discriminate on the basis of race. The

[7] Significantly, the District Court's statement speaks in terms of "*if* we accept the Plaintiff's side of the case all the experts say, . . . is that what has transpired in the real world at Uncle Ben's could not have statistically happened by chance," not that the District Court *did* accept Plaintiff's side. Obviously, the District Court did not. *See, generally* Findings of Fact Nos. 10-19 (App. C-4, C-5, C-6).

law does not say that the defendant shall not violate the rules of mathematical probability.

A business such as the Defendant's cannot be run successfully by chance. Decisions as to who may best serve in any given job must be made rationally by persons with sufficient knowledge of the individuals and the jobs involved to make such decisions.

Second, having had the opportunity both to see and hear all of the witnesses in this case, I have concluded that any discrimination at Uncle Ben's has been color blind. In this case it has been between individuals without reference to race or other impermissible criterion. (App.C-2). (Emphasis supplied).

D. THE COURT OF APPEALS' DECISION

Initially, the Fifth Circuit affirmed *per curiam*, stating:

> In the course of rendering its decision, the district court stated "that what has transpired . . . at Uncle Ben's could not have statistically have [sic] happened by chance," yet "[t]he law does not say that defendant shall not violate the rules of mathematical probability." Although this and similar statements indicate the court's confusion as to the role of statistics in cases of this sort, e.g., *Fisher* v. *Proctor & Gamble Mfg. Co.*, . . . F.2d . . . (5th Cir. 1980) [slip op. 3737, 3757], we affirm because, when evaluated on legally sufficient grounds, the district court's findings regarding the lack of discrimination in the promotion of blacks at Uncle Ben's are not clearly erroneous.

On rehearing, the Fifth Circuit reversed the District Court's decision in part and remanded the case to the District Court. The Court of Appeals premised that reversal on its conclusion that the District Court's statement "the law does not say that the defendant shall not violate the rules of mathematical probability"[8] is an incorrect assessment of the role of statistics in a Title VII case. Noting that the "clearly erroneous" standard of

[8] Through the use of italics, it is clear that this statement was specifically viewed by the Fifth Circuit as the basis for concluding the

Rule 52(a) does not apply to findings of fact made under an erroneous notion of controlling legal principles, the Court purportedly undertook an independent analysis of the record.

The Fifth Circuit did not set aside any of the detailed Findings of Fact of the District Court. Instead, the panel focused on what it perceived as omissions from those findings, observing that the District Judge "frankly ignored deciding the questions of whether any promotion or upward mobility occurs at Uncle Ben's, and, if so, whether blacks suffer a disparate impact in seeking promotions" (App. A-14). In the Fifth Circuit's view, the District Court based its conclusion that Uncle Ben's had not violated Title VII on favorable statistics comparing Uncle Ben's work force at various levels and similar Houston SMSA job levels (App. A-18). Accordingly, the Court remanded the case to the District Court to enter new findings.

> First, the new findings must determine the number of Uncle Ben's jobs that were filled by promotion ..... Second, the District Court must decide whether Uncle Ben's has rebutted or discredited plaintiffs' prima facie showing that in promotions blacks are relegated to lower level jobs and are promoted at a significantly slower rate than whites. On this question, statistics comparing Uncle Ben's work force to the external labor market are irrelevant. Third, the district court also must find whether the legitimate nondiscriminatory reasons that it credited, based on a correct view of the controlling legal principles on that point, apply to any of the promotion positions and not just to the lateral hire positions (App. A-14, A-15).

On the latter point, the Court held that Uncle Ben's was required to prove the existence of legitimate, nondiscriminatory reasons by a preponderance of the evidence (App. A-10).

District Court applied an erroneous notion of controlling legal principles regarding the use of statistics (App. A-5).

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S HOLDING THAT THE DISTRICT COURT EMPLOYED AN ERRONEOUS STANDARD TO ASSESS STATISTICAL EVIDENCE ITSELF MISCONCEIVES THE PROPER ROLE OF STATISTICAL EVIDENCE IN JUDGING DISCRIMINATION.

> We are not here to enforce a law which says that things must occur within the limits of mathematical probability. The law says the defendant may not discriminate on the basis of race. The law does not say that the defendant shall not violate the rules of mathematical probability (App. C-2).

This statement was made by the District Court from the bench after the presentation of Plaintiff's case in chief, the introduction of Uncle Ben's rebuttal evidence, and the testimony of Plaintiff's rebuttal witnesses. The Fifth Circuit held the statement "the law does not say that the Defendant shall not violate the rules of mathematical probability" to be an incorrect legal standard[9] and determined that in light of the District Court's "misunderstanding" of the role of statistics in Title VII cases, the reviewing Court was not bound by Rule 52(a)'s "clearly erroneous" standard (App. A-5, A-6).

The Fifth Circuit did not explain why it judged the District Court's statement to be incorrect. Although the Court cited such oft-quoted principles as "statistics play an important role in judging discrimination" and "gross statistical disparities may establish a prima facie case," (App. A-6), the Court nevertheless recognized that "[t]he district court correctly determined that plaintiff's *statistical evidence* and testimonial evidence made out a *prima facie* showing of discrimination against blacks on the promotion issue" (App. A-10) (emphasis supplied). Moreover,

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[9] *See* Note 8, *supra*.

with the numerous findings by the District Court regarding statistical analyses, *see e.g.*, Findings of Fact Nos. 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 (App. C-4, C-5, C-6), it cannot be said that the District Court ignored or considered irrelevant statistical evidence or failed to recognize the "important role" of statistics in judging discrimination.[10]

The District Court's remarks at the conclusion of Plaintiff's examination of his rebuttal witnesses, later incorporated into his detailed Findings of Fact, stated that even *if* Plaintiff's statistical analysis were credited, all it showed was that what transpired at Uncle Ben's could not have statistically happened by chance.[11] Significantly, however, noting that the law prohibits racial discrimination and not the mere violation of the rules of mathematically probability, the District Court added that having seen and heard all of the witnesses, in the Court's judgment, any discrimination "has been color blind . . . between individuals without reference to race" (App. C-2).

When read in context, it is clear that *all* the District Court said was that evidence of statistical disparities standing alone does not *prove* discrimination. While statistical disparities may establish a *prima facie* case, the inquiry is not ended. The burden merely shifts and the Defendant is given an opportunity to rebut Plaintiff's statistics or justify any disparities by articulating legitimate, nondiscriminatory reasons for its actions.

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[10] The careful attention paid by the District Court to Plaintiff's and Defendant's statistical testimony and the Court's thorough evaluation of statistical analyses in assessing Plaintiff's claims, as evidenced by Findings of Fact Nos. 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19, is addressed at pages 14 through 17, *infra*.

[11] As observed in note 7, *supra*, the District Court did not credit Plaintiff's analysis. On the contrary, Findings of Fact Nos. 11 and 12 make clear that the District Court *discredited* the conclusion drawn by Plaintiff from his statistical analysis that blacks suffered limited "upward mobility" in terms of wage increases.

Where such reasons exist, statistical imbalances, even if present, prove nothing.

If the foregoing statement represents an incorrect understanding of the role of statistics in a Title VII case, then, according to the Fifth Circuit, the converse must be true. That is, "the law says the defendant shall not violate the rules of mathematical probability." This statement is obviously inaccurate. If the mere violation of the rules of mathematical probability contravenes federal civil rights standards, then the entire body of case law developed by this Court has been grossly altered. *International Brotherhood of Teamsters* v. *United States,* 421 U.S. 324, 339-40 (1977) and *Hazelwood School District* v. *United States,* 433 U.S. 229, 307-08, 312-13 (1977), admonish that while gross statistical disparities alone may in a proper case constitute *prima facie* proof of discrimination, "statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." While statistics may be "helpful" in proving discrimination, they are not controlling as to individualized employment decisions. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 805 n.19 (1973). "The use of statistics is conditioned by the existence of proper supportive facts and the absence of variables which would undermine the reasonableness of the inference of discrimination which is drawn." *White* v. *City of San Diego,* 605 F.2d 455 (9th Cir. 1979). "In addition to statistics, a court must also examine patterns, practices and general policies to ascertain whether racial discrimination exists." *Barnett* v. *W. T. Grant Co.,* 518 F.2d 543 (4th Cir. 1975).

The statement of the District Court, while rejected in this instance by the Fifth Circuit, is remarkably similar to statements made by that Court in other cases. *See, e.g., U.S.* v. *City of Miami,* 614 F.2d 322 (5th Cir. 1980) ("Of course, statistics do not tell the whole story. There may well be an explanation

other than intentional racial or sexual discrimination for some or all of these statistical disparities."); *Hereford* v. *Huntsville Board of Education,* 574 F.2d 268, 273 (5th Cir. 1978) ("Discrimination in promotions is not proved merely by the absence of blacks in particular positions . . . . For a cause of action to exist, the defendant must actually have discriminated on the basis of race.") The Fifth Circuit has cautioned that statistics must be kept in perspective:

> We recognize that statistics are a powerful tool in the hands of the Title VII plaintiff, but we are also aware that undue emphasis upon their use may obscure rather than advance the judicial process.

Hester v. *Southern Railway Co.,* 497 F.2d 1374, 1381 (5th Cir. 1974). Obviously, that perspective has not been maintained in the instant case.

The Fifth Circuit took a statement which, on its face, is nothing more than a simple, yet accurate summarization of the shifting burdens and degrees of proof in a Title VII case, lifted one sentence out of context (which nevertheless was absolutely accurate), and without explanation, declared "this standard is incorrect" (App. A-6). In response to this assessment of the District Court's statement, the admonition of Justice Rehnquist in his dissent from the denial of certiorari in *Procter & Gamble Manufacturing Co.* v. *Fisher,* (No. 80-474, January 19, 1981), is well taken.

> This Court has recognized that "[s]tatistical analysis has served and will continue to serve an important role as one indicator of racial discrimination . . . ." *Mayor of Philadelphia* v. *Educational Equality League,* 415 U.S. 605, 620 (1974). The blind use of statistics, however, cannot be permitted to undermine the policies of Congress or erode our decisions on substantive law. Disraeli's familiar statement that "there are three kinds of lies: lies, damn lies and statistics," rings true in this case.

In the instant case, the District Judge, who heard weeks of statistical and testimonial evidence and reviewed a multitude of exhibits, carefully evaluated whether Uncle Ben's promotion practices were discriminatory and entered detailed Findings of Fact. In its initial, *per curiam* opinion, the Fifth Circuit held these findings not clearly erroneous when evaluated on legally sufficient grounds (App. B-2). Thereafter, without explanation or meaningful analysis and based on its own misconceived approach to statistics, the Fifth Circuit undertook an independent review of the record and concluded that certain findings, although not necessarily erroneous, were lacking (App. A-14, A-15, A-16). Claiming that the District Court "frankly ignored deciding the question of whether any promotion or upward mobility occurred at Uncle Ben's, and if so, whether blacks suffer disparate impact in seeking promotions," the Fifth Circuit remanded the case to the District Court to enter new findings on the promotion issue.

The claim by the Fifth Circuit that the District Court failed to address whether any promotions occurred at Uncle Ben's is patently erroneous. Finding No. 19 makes clear that the District Court did indeed evaluate actual promotions that occurred at Uncle Ben's during the relevant time frame and concluded:

> 19. In terms of the number of employees promoted, their time in grade prior to promotion, and wage increases received upon being promoted, the Court finds that there has been no statistically significant difference in the treatment of Defendant's black and white employees. See Defendant's Exhibit Nos. 36, 37, 38, 39, 40, 41, 42 (App. A-C).

This Finding is, as it so states, predicated upon Defendant's Exhibit Nos. 36-41 and 42 (A-C), *wherein all promotions at*

Uncle Ben's for 1970-1974 were analyzed in terms of the three factors enumerated in Finding No. 19.[12]

Finding No. 12 addresses Plaintiff's analysis of "upward mobility," i.e., monetary advances over time, of blacks and whites employed by Uncle Ben's throughout the relevant time frame. It specifically discredits Plaintiff's assertion based on Exhibit No. 8, Table III.3 that blacks suffered limited upward mobility in terms of wage increases.

> . . . Further, contrary to Table III.3 of Plaintiff's Exhibit No. 8, the Court finds that the percentage increase in black wages exceeded the percentage increase in white wages regardless of whether or not individuals in job classifications falling within the EEOC category "Officials & Managers" are included. See Defendant's Exhibit No. 31. Utilizing salary level groupings suggested by Plaintiff's Exhibit No. 8, *e.g.*, employees earning less than a given amount, any differences in black-white wage increases during the 1971-1974 period were not statistically significant. See Defendant's Exhibit No. 57 (App. C-4, C-5).

It further finds:

> During the period from August 8, 1971 through May 10, 1974, limiting the analysis to employees who were employed on both dates, Defendant's black employees received a

[12] Defendant showed that employee advancement in each of its three major job groupings — plant-hourly, office-hourly, and salaried — is normally within that group and rarely involves moving up more than one or two job zones (Exhibit No. 42(A-C)). Defendant further established that the time spent in a particular job zone varied among the three classifications (Exhibit Nos. 36, 37, 38). Accordingly, Defendant presented an analysis comparing the movement of black and white employees within each classification from one job zone to another during the period July 1970 to June 1974. The District Court determined that because of these office-plant differences, statistical analyses which separate office and plant employees were proper, allowing meaningful comparisons to be made and conclusions drawn. *See*, Findings of Fact Nos. 17 and 18 (App. C-6).

statistically significant greater wage increase than did Defendant's white employees (App. C-4).[13]

Blacks employed throughout this time period received an average 23.01% wage increase, while whites averaged only 17.97%, a statistically significant difference amounting to 5 standard deviations.

Findings 11 and 13 make clear the District Court's conclusion that any "differences in wage increases ... or claimed differences in upward mobility between black and white employees, were due to specific individual attributes of Defendant's employees" and "were not due to ... race" (App. C-4, C-5). These findings credit the testimony of Defendant's Director of Personnel, Herman Koehn, who identified by name all black employees hired prior to 1/1/60 and still employed on 5/10/74 and all black employees hired prior to 7/2/65, earning less than $7,000.00 in 1965, and still employed as of 5/10/74. Mr. Koehn, based on his approximately seventeen years of experience in personnel at Uncle Ben's, provided detailed, specific and individualized facts explaining why the upward mobility of these identified black employees, to the extent it had been limited, was limited.[14]

Clearly, based upon the foregoing, it cannot be said that the District Court failed to properly address whether promotions occurred at Uncle Ben's and, if so, whether there were any differences respecting promotions, or upward mobility, as between Defendant's black and white employees. The Fifth Circuit, however, ignored the foregoing findings and remanded the case to the District Court to do that which the District Court *already has done.*

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[13] Contrary to the Fifth Circuit's assertion, Finding 12 does not commingle promotions with lateral hires. In response to Plaintiff's allegations of differences in black-white "upward mobility," Finding 12 addresses black-white wage increases and is *limited to individuals employed by Uncle Ben's throughout the relevant time frame.* It has nothing to do with hiring.

[14] *See* note 6, *supra.*

The unnecessary remand of the instant case to the District Court is the result of the Fifth Circuit's loss of perspective on the role of statistical evidence in assessing claims of employment discrimination. As the District Court stated, it is against the law to discriminate on the basis of race; it is not against the law to violate the rules of mathematical probability. The inaccuracy of the Fifth Circuit's assessment of this statement cannot be allowed to stand if statistical evidence is to advance, rather than obscure, the judicial process in civil rights litigation.

II. THE UNQUALIFIED USE OF STATIC WORKFORCE DATA TO ESTABLISH A *PRIMA FACIE* CASE OF PROMOTION DISCRIMINATION AND THE REJECTION OF COMPARISONS TO EXTERNAL LABOR FORCE DATA CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

Without qualification, the Fifth Circuit embraced the theory that a *prima facie* case of promotion discrimination can be established through static workforce data showing that as of a particular date the percentage representation of a protected class in upper level positions differs from that group's percentage representation in lower level positions.[15] According to the Fifth Circuit, for example, a *prima facie* case of promotion discrimination is established where the black representation in upper level positions, e.g., 20%, is less than the percentage black representation in lower level positions, e.g., 50%. Moreover,

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[15] According to the Fifth Circuit, "Plaintiff's case of employment discrimination against blacks showed that the proportion of that group in each job grade did not reflect the proportion of blacks available for promotion from lower job levels" (App. A-10). In support of this statement, the Circuit footnoted certain static workforce data evidencing a differential in the percentage representation of blacks in higher and in lower job grades, stating "[t]he overall pattern appeared to be one of blacks being clustered in the lowest paying jobs" (App. A-10, n.2.). Neither Plaintiff nor the Fifth Circuit was concerned with whether those blacks "available for promotion from lower job levels" were qualified for such promotion.

again according to the Fifth Circuit, rebuttal evidence which shows that the distribution of protected class members (blacks) in the employer's workforce compares favorably with their distribution throughout similar job levels and positions within the external labor market is *irrelevant* (App. A-15). This approach and the holding as to the relevancy of external labor market availability data conflict with decisions of this Court and other Circuits.

Where, as here, special skills and qualifications are required for promotion to particular jobs,[16] comparative statistics must be limited to members of the protected group who possess such requisite skills and qualifications. *Hazelwood School District* v. *United States, supra* at 308 n.13. Indeed, following this Court's reasoning in *Mayor of Philadelphia* v. *Educational Equality League*, 415 U.S. 605, 620 (1974), unless "it can be assumed that all [of Uncle Ben's employees] are fungible for purposes of determining whether members of a particular class have been lawfully excluded," a comparison *without regard to qualifications* of the percentage of black employees holding lower level positions to the percentage holding upper level positions is meaningless. Unless the promotion position is one for which all employees are presumptively qualified, general workforce figures are not, for statistical analysis purposes, significantly dissimilar from "general population statistics" which even the Fifth Circuit recognized in *Hester* v. *Southern Railway Company, supra* at 1378, n.6., are "of questionable value when . . . considering positions for which, as here, the general population is not presumptively qualified."

This point has been expressly recognized by the Ninth Circuit in *Pack* v. *Energy Research & Development Administration*, 566 F.2d 1111 (9th Cir. 1977), *citing Mayor of Philadelphia* v.

[16] *See* Note 5, *supra*.

Educational Equality League, supra, at 620. Expressing agreement with the lower court's finding that plaintiff's statistical evidence failed to establish a *prima facie* case of promotion discrimination, the Ninth circuit stated:

> [Plaintiff] proved that on a given date at the [employer's] facility, approximately 98% of the employees at grades GS-11 and above were males, whereas 95% of the lower-grade professionals were females. No evidence whatsoever was introduced to demonstrate that the lower-level professional women were qualified to occupy the higher positions. . . .

Pack, supra at 1113.

In response to static workforce data showing that as of March 31, 1974, the percentage of blacks employed in Defendant's lower (generally unskilled) job zones exceeded the percentage employed in higher (generally skilled) job zones, Defendant established that the employment of blacks throughout its job zones was not suggestive of a pattern of discrimination. The District Court specifically found:

> 14. As of March 31, 1974, the Defendant employed 141 blacks out of a total workforce of 394 employees. Considering the job classifications utilized at Defendant's facilities and the necessary requirements for those jobs, and based upon the 1970 United States Census availability data, . . . the Defendant employed an equitable number of blacks in view of their availability within the Houston SMSA. (Finding of Fact No. 14, App. C-5).

Erroneously focusing exclusively on Finding 14, the Fifth Circuit concluded that the District Court's finding of no violation of Title VII was singularly bottomed upon "the favorable statistical comparison between Uncle Ben's at various levels and similar Houston SMSA job levels" (App. A-13). Ignoring the multiple findings discrediting and rebutting Plaintiff's *prima facie* case of statistical disparity, the Fifth Circuit directed that in considering whether Uncle Ben's has rebutted or discredited Plaintiff's

prima facie case "statistics comparing Uncle Ben's workforce to the external labor market are irrelevant" (App. A-15).

While comparing the composition of employees promoted against the internal pool of employees *qualified* for promotion may be of greater relevance, comparisons against external labor market data showing the percentage representation of the protected group who possess the skills and qualifications required for promotion are not irrelevant. In the instant case, Plaintiff made no effort to identify those employees possessing the requisite skills or qualifications required for promotion. Rather, Plaintiff assumed that simply because they were employed at Uncle Ben's all employees were qualified for promotion and, therefore, included all employees in the pool of promotion candidates. In *Teamsters, supra* at 340 n.20, this Court stated that "evidence showing that the figures for the general population might not accurately reflect the pool of qualified applicants would . . . be relevant." This reasoning has equal application to evidence showing that an employer's general workforce figures might not accurately reflect the pool of employees qualified for promotion to upper level positions. Thus, Defendant's comparisons against external labor market figures are clearly relevant since they suggest that Uncle Ben's general workforce figures do not accurately reflect the percentage of blacks in lower level jobs qualified for promotion.

Defendant's extenal labor market data, which reflects the distribution of skills and abilities in the Houston SMSA, reveals that only a small percentage of blacks possess highly technical, professional or craftsmen skills. In contrast, the percentage of blacks who possess relatively no skills is substantially higher than the percentage of whites. It is not surprising, therefore, that a larger number of blacks at Uncle Ben's are located in the lower level jobs that require limited skills and qualifications and that fewer blacks occupy jobs requiring skills and qualifications that cannot be acquired simply by working at Uncle Ben's.

Since a great many of the upper level positions require qualifications not presumptively possessed by the general population or workforce and which are not generally obtained through on-the-job experience at Uncle Ben's, there is no reason to suspect that the internal availability of qualified candidates for upper level positions differs from the external availability. Clearly under these circumstances, it cannot be assumed that because you have "X" number or percentage black employees in lower level positions that you should have that same percentage black representation in upper level positions. Thus, a comparison of the distribution of blacks within Uncle Ben's job levels against black distribution in "similar Houston SMSA job levels" is indeed relevant. And since this comparison is favorable, it serves as rebuttal evidence to any *prima facie* showing of promotion discrimination which may be based upon static workforce figures. Moreover, it suggests that Defendant's employment practices overall, including promotion practices, are not racially discriminatory.

The relevance of external labor market comparisons in a promotion context has explicity been recognized by the Fourth Circuit. Where special skills are required, external workforce comparisons, while not necessarily controlling as to the available labor pool, "may nonetheless be relevant." *EEOC* v. *Radiator Specialty Company*, 610 F.2d 178, 186 (4th Cir. 1979). "[P]roper regard must be given to . . . qualified labor market statistics in the absence of evidence indicating the actual percentage of blacks in lower positions who possess the required qualifications." *Radiator Specialty, supra* at 186-87.

In *Hill* v. *Western Electric Company, Inc.*, 596 F.2d 99 (4th Cir. 1979), the court accepted testimony that experience, job knowledge and skills were important factors in the process of selecting people for promotion. *Hill, supra* at 105-106. In determining whether there was discrimination in the rate of promotion, the *Hill* court analyzed statistical evidence which

indicated the number of people qualified for promotion based on their length of experience in the hourly labor pool and compared with the local Washington SMSA data. The court noted, for example, that 9.8% of those promoted to salaried positions during the relevant time were black, while only 7% of blacks in the hourly paid workforce at that time had as much as ten years experience. Relevant labor force SMSA data suggested only 4% of the labor force, however, were qualified to fill the positions in question.

The Fifth Circuit's holding that external workforce data is irrelevant on the issue of discrimination in promotions is at odds with the foregoing Fourth Circuit decisions. Likewise, its approval of the unqualified use of static workforce data to establish a *prima facie* case of promotion discrimination conflicts with decisions of this Court and the Ninth Circuit. This Court, accordingly, should grant certiorari to resolve these issues in order to ensure consistency and uniformity among the Circuits addressing statistical evidence in promotion cases.

III. THE FIFTH CIRCUIT'S HOLDING THAT DEFENDANT MUST PROVE THE EXISTENCE OF LEGITIMATE, NONDISCRIMINATORY REASONS BY A PREPONDERANCE OF THE EVIDENCE CONFLICTS WITH DECISIONS OF THIS COURT AND THE FIRST CIRCUIT.

In *McDonnell Douglas Corp.* v. *Green, supra* at 802-05, the Supreme Court held that once the Plaintiff has proven the elements of a *prima facie* case, "the burden then must shift to the employer . . . to *articulate* some legitimate, nondiscriminatory reasons for [its personnel action]." When the defendant has articulated a legitimate reason for its action, it becomes plaintiff's burden to demonstrate that the reason articulated is merely a pretext. The mechanics of burden shifting in *McDonnell Douglas* and the meaning of the word "articulate" have caused "no little difficulty among courts." *Loeb* v. *Textron, Inc.*, 600

F.2d 1003, 1011 (1st Cir. 1979). In the instant decision, the Fifth Circuit interpreted *McDonnell Douglas* to require Defendant to prove the "existence of legitimate, nondiscriminatory reason for [its] action by a preponderance of the evidence" (App. A-10). The requirement that Defendant *prove* its reliance on legitimate, nondiscriminatory reasons was first announced by the Fifth Circuit in *Turner* v. *Texas Instruments, Inc.* 555 F.2d 1251, 1255 (5th Cir. 1977), [17] and was reaffirmed in *Burdine* v. *Texas Department of Community Affairs,* 605 F.2d 563 (5th Cir. 1979), petition for cert. granted, No. 79-1764, 48 U.S.L.W. 3813 (June 17, 1980), (Arg. December 9, 1980). The propriety of this standard is now before this Court on writ of certiorari.

The Fifth Circuit's holding that "articulate" means "prove" is contrary to this Court's decision in *Board of Trustees of Keene State College* v. *Sweeney,* 439 U.S. 24 (1978). In *Sweeney,* the Court rejected the First Circuit's holding whereby it interpreted "articulate" to include proof of the absence of discriminatory motive. The Court remanded the case, noting that "there is a significant distinction between merely 'articulat[ing] some legitimate nondiscriminatory reason and prov[ing] absence of discriminatory motive." *Sweeney, supra* at 25. Significantly, the majority and dissent in *Sweeney* agreed that "the employer's burden is satisfied if he simply 'explains what he has done' or 'produce[s] evidence of legitimate nondiscriminatory reasons.' "

[17] In *Texas Instruments,* the Fifth Circuit sought to resolve confusion generated by differing standards announced in two prior decisions. The resolution it adopted was to reject the standard announced in *Peters* v. *Jefferson Chemical Co.,* 516 F.2d 447 (5th Cir. 1975), that "the employer's burden is only one of production — coming forward with legitimate, nondiscriminatory reasons for the [action]," and holding the proper standard to be that "the employer bears the burden of proving the legitimate, nondiscriminatory reasons for its actions by a preponderance of the evidence." *Texas Instruments, supra* at 1255.

Id. at 25, n. 2[18]. *Sweeney* should have made clear to the Fifth Circuit that the burden to articulate is not a burden of persuasion, i.e., to prove the existence of nondiscriminatory reasons, but a burden of production — to articulate or state a valid reason. *Loeb* v. *Textron, Inc., supra* at 1011.

In *Sweeney*, the First Circuit had required the defendant to prove absence of discriminatory motive. The Fifth Circuit in this case has, in effect, imposed the same burden on Uncle Ben's. If Defendant proves by a preponderance of the evidence that its actions were based on legitimate reasons, it necessarily also proves the absence of discriminatory motive. The third step of the *McDonnell Douglas* test is rendered superfluous.

> If an employer were to *prove* that he was motivated by a legitimate reason, there would be no room left for showing that reason was a "pretext", as a pretext is "a purpose or motive alleged or an appearance assumed in order to cloak the real intention or state of affairs," Webster's Third New International Dictionary (1971). To say, as the court did here that the defendant must prove that its action *was* based on a legitimate reason *and* that the plaintiff must "then" prove that it was not, is contradictory.

Loeb v. *Textron, Inc., supra* at 1012.

Because of the obvious importance of burden of proof issues in employment discrimination cases, certiorari should be granted.

IV. THE FIFTH CIRCUIT'S TREATMENT OF THIS CASE AS ONE OF DISPARATE IMPACT IS CONTRARY TO *INTERNATIONAL BROTHERHOOD OF TEAMSTERS V. UNITED STATES AND FURNCO CONSTRUCTION CORP. V. WATERS*

Although its opinion is not a model of clarity, the Fifth Circuit apparently believes this to be a "disparate impact" case as

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[18] *Compare* 439 U.S. 24, 28-29 (Stevens J., dissenting). "In litigation the only way a Defendant can 'articulate' the reason for his action is by *adducing evidence that explains what he has done* . . ." (emphasis supplied).

to which "[t]he class plaintiffs do not need to prove knowing and intentional discrimination" (App. A-6). While Defendant established the absence of a statistical pattern of differences or disparity in promotion as between Uncle Ben's black and white employees and the existence of legitimate nondiscriminatory reasons for any claimed differences, the suggestion that Plaintiff need not prove that the challenged actions were "racially premised" is erroneous. This case should properly be analyzed under the disparate treatment theory. *McDonnel Douglas Corp.* v. *Green, supra; Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978).

Although Plaintiff generally claimed that blacks suffered limited upward mobility, such limitations were not ascribed to any particular employment practice of Defendant, much less to any objective or facially neutral practices. Plaintiff simply contended that blacks suffered limited upward mobility because of their race and attempted to establish a pattern of disparity through statistical analyses comparing the monetary advancement over time of Defendant's black and white employees. No effort was made to correlate such analyses with any employment standard or requirement.

In order to establish a *prima facie* case on a *disparate impact* claim, Plaintiff must demonstrate that an objective, identifiable practice, neutral both on its face and its intent, e.g., an employment test, operates to exclude minorities. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430-32 (1971); *Teamsters, supra*, at 335 n.15. While *Griggs* and its broad language have been often cited, it is clear that application of the disparate impact theory is not without limits. In *Furnco Construction Corp.* v. *Waters, supra*, which involved an allegedly discriminatory hiring procedure based upon subjective management decisions, the Supreme Court emphasized this limitation. The Seventh Circuit, in assessing the applicability of the *Griggs* "principle," stated: "This is not a case, like *Griggs*, of comparing white and black applicants

by *objective but irrelevant standards*, and rejecting more blacks, proportionately, than whites." *Waters* v. *Furnco Construction Corp.*, 551 F.2d 1085, 1089-90 (7th Cir. 1977) (emphasis supplied). In agreeing with the Seventh Circuit that the case properly should be analyzed under the disparate treatment rationale of *McDonnell Douglas, supra*, this Court noted:

> This case did not involve employment tests, which we dealt with in *Griggs* v. *Duke Power Co., supra*, and in *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 412-12, 10 FEP Cases 1181, 1185 (1975), nor particularized requirements such as height and weight specifications considered in *Dothard* v. *Rawlinson*, 433 U.S. 321, 329, 15 FEP Cases 10, 13 (1977), and it was not a "pattern or practice" case like *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 358, 14 FEP Cases 1514, 1529, (1971).

Furnco, supra, at 4968 n.7. *Furnco* thus expressly recognizes that the disparate impact theory is limited to facially neutral, "objective but irrelevant" employment practices.

Teamsters, supra, also emphasizes the distinction between allegations of disparate treatment and disparate impact.

> "Disparate treatment" such as alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . .
>
> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are *facially neutral* in their treatment of different groups but that in fact fall more harshly on one group than another. . . .

Teamsters, supra at 335 n.15.

For analytical purposes, the instant case is indistinguishable from the pattern and practice allegations under Title VII

addressed in *Teamsters, supra.* In both cases, it was alleged that the defendant employer failed to treat minority group members on an equal basis with white people.[19] Expressly recognizing that such allegations fall under the "disparate treatment" theory, *Teamsters, supra* at 335 n.15, this Court recognized that "[t]he ultimate factual issues are thus simply whether there was a pattern or practice of such disparate treatment and, if so, whether the differences were 'racially premised.' " *Teamsters, supra* at 335, quoting *McDonnell Douglas, supra* at 805 n.18. Likewise, in the instant case, even if a pattern of differences in treatment, as alleged, is established through statistical evidence, it remains Plaintiff's burden to prove that such differences were "racially premised."[20]

The Fifth Circuit failed to recognize the limitations on the disparate impact theory in the instant case, apparently assuming that classwide claims automatically raise the issue of disparate

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[19] See also, *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), in which the principles of *McDonnell Douglas* were applied "in the context of a class action." *Teamsters, supra* at 858-59.

[20] The Fifth Circuit erroneously ignored the fact that this case is primarily under 42 U.S.C. §1981, not Title VII. Suit was initially filed under §1981. The pre-trial order stated the issues in terms of determining discrimination from and after March 28, 1972. This time frame limitation under §1981 is consistent with *Johnson* v. *Goodyear Tire & Rubber Co., supra.* The Title VII allegations were not added until September 12, 1975, with the relevant time frame under Title VII commencing August 19, 1973 — 180 days prior to the filing of the underlying EEOC charge. *United Airlines* v. *Evans, supra.* Thus, under any theory, purposeful discrimination must be shown for that part of the relevant time frame covered only by §1981 — March 28, 1972 to August 19, 1973. *See Washington* v. *Davis,* 426 U.S. 229, 239-40 (1976); *Crawford* v. *Western Electric Co.*, 614 F.2d 1300, 1308-09 (5th Cir. 1980); *Grigsby* v. *North Mississippi Medical Center, Inc.*, 586 F.2d 457, 460-61 (5th Cir. 1978); *Williams* v. *DeKalb County*, 582 F.2d 2, 3 (5th Cir. 1978).

impact irrespective of whether or not such claims allege discrimination as the result of facially neutral, objective employment practices. This failure and the confusion it will inevitably generate should be addressed and remedied by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Neil Martin
Philip J. Pfeiffer
Robert S. Bambace

Of Counsel:

FULBRIGHT & JAWORSKI
Landmark Building, Suite 200
705 E. Houston Avenue
San Antonio, Texas 78205
(512) 224-5575

CERTIFICATE OF SERVICE

I, Neil Martin, attorney for Petitioner Uncle Ben's, Inc., do hereby certify that on this 20th day of February, 1981, three copies of the foregoing petition were mailed to each of the following counsel of record for the Plaintiff in this proceeding:

Mr. Jerry D. Anker
Mr. Randell L. Speck
Wald, Harkrader & Ross
1320 Nineteenth Street, N.W.
Washington, D.C. 20036

Ms. Carol Nelkin
Nelkin & Nelkin
5417 Chaucer Street
P. O. Box 2503
Houston, Texas 77005

Neil Martin

Neil Martin